No. 18805

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOMER L. WOXBERG, SR., and WAYNE FRANKLIN DYKES,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING.

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To the Honorable Presiding Judge Stanley N. Barnes and the Honorable Circuit Judges Charles M. Merrill and M. Oliver Koelsch of the United States Court of Appeals, Ninth Circuit:

Pursuant to Rule 23 of this Court, appellants Homer L. Woxberg, Sr. and Wayne Franklin Dykes respectfully petition this Court for rehearing in the above captioned case.

After the filing of extensive Briefs and the hearing of oral argument, the opinion and decision of this Court was filed on March 12, 1964. This decision reversed both appellants' convictions under Count 1 and appellant Woxberg's conviction under Counts 9 and 10 and affirmed the conviction of both appellants under Count 2. This petition is directed to Count 2 only.

Grounds for Granting a Rehearing.

I.

The decision of the Ninth Circuit as to Count 2 is in conflict with the principle and decision of the United States Supreme Court in *United States v. Carter,* 353 U. S. 210, 77 S. Ct. 793, 1 L. ed. 2d 776 (1957), because the Trial Court and this Court must find that the "Severance Fund" was a valid and legal trust, since no evidence to the contrary appears in the record of the proceedings below. (Points I(2) and II(1) of A. O. B.) As stated in the Opinion of the Court at page 14:

> "Appellants argue that the union had 'a continuing duty to see to it that the funds contained therein were distributed to the employees as a gross amount.' (Br. p. 65.) This is valid argument to a jury, but not to this court. Reliance is placed on *United States v. Carter,* 1957, 353 U. S. 210, but the facts of that case do not resemble those here present. *To make that case applicable would require us to find that the original creation of the severance fund was lawful,* a question which we do not reach because of our determination that the lack of retroactive effort of § 501(c) is here controlling as to Count I, and a question decided adversely to appellants by the jury." (Emphasis added.)

A finding, however, it is respectfully submitted, this Court must reach as a matter of law in deciding Count 2.

II.

The decision of the Ninth Circuit is in error in ruling that the evidence of fraudulent intent is sufficient as to Count 2 because there is no evidence from which a reasonable inference can be drawn that the words "arbitration audit", relied upon in the Opinion as the evidence of fraudulent intent, were placed on the check in question under the direction of either appellants, since Mrs. Dorothy Johnson, the bookkeeper, called as a government witness, testified that she had no independent recollection of the source of said terminology [R. Tr. p. 993, line 8, to p. 994, line 9], and that she had no memory as to who told her to put the words "arbitration audit" on the check, if at all [R. Tr. p. 992, line 21, to p. 994, line 14].

For the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

ROBERT A. NEEB, JR.,
Attorney for Appellant Woxberg,
GRANT B. COOPER,
Attorney for Appellant Dykes.

Certificate.

I certify that in connection with the preparation and submission of this Brief for rehearing that the same is, in my judgment, well founded and that it is not interposed for delay.

GRANT B. COOPER